82-1558

CASE NO. _____

UNITED STATES SUPREME COURT

October, 1982 Term

Norman C. Gagnon and Philip C. Chouinard

Defendant-Appellants

vs.

Commonwealth of Massachusetts

Appellee

On Appeal From A Judgment Of The
Supreme Judicial Court Of The
Commonwealth of Massachusetts

Jurisdictional Statement

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QUESTIONS PRESENTED BY APPEAL

1. Where criminal Defendants file a timely pre-trial Motion to Dismiss their indictments, challenging the constitutionality of the statute under which they were indicted; where said Motion is denied and the Defendants are tried, convicted and sentenced; and where on appeal of the said Motion the challenged statute is adjudged unconstitutional; may said Defendants then be re-sentenced under a different statute charging a lesser, included offense?
2. Where criminal Defendants are indicted, tried, convicted and sentenced pursuant to a statute which is adjudged void for vagueness on appeal, is the proper remedy the dismissal of the indictments or may the Defendants be re-sentenced pursuant to another statutory provision under which they were never indicted, tried or

convicted but which is deemed by the State to comprehend a lesser, included offense?

3. Where criminal Defendants are indicted, tried, convicted and sentenced under a statute which is adjudged void for vagueness on appeal, does the re-sentencing of the Defendants pursuant to another statutory provision under which they were never indicted, tried or convicted but which is deemed by the State to comprehend a lesser, included offense constitute a violation of the constitutional prohibition against double jeopardy?

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TABLE OF AUTHORITIES CITED IN SUPPORT OF THIS STATEMENT

The Complete Text of the above cited Constitutional and Statutory provisions is set out in the Appendix hereto, beginning at Page 16.

REPORTS CITED HEREIN

I. Massachusetts Reports - official reports of decisions of the Supreme Judicial Court and the Appeals Court.

II. Northeastern Reporter, Massachusetts Decisions - unofficial reports of decisions of the Supreme Judicial Court and the Appeals Court.

STATEMENT OF JURISDICTIONAL GROUNDS

1. Nature of Proceeding: Appeal from a Judgment of the Massachusetts Supreme Judicial Court entered in a joint appeal by Defendant-Appellants of their convictions on charges of unlawful possession of heroin with intent to distribute.

2. Date of Entry of Judgment: Dec. 23, 1982
   Date of Notice of Appeal: Jan. 27, 1983
   Court of Notice: Massachusetts Supreme Judicial Court; copy filed in Essex County Superior Court.

3. Statutory Basis for Appeal:
   28 U.S.C. 1257(2) and 28 U.S.C. 2102.

4. Constitutional and Statutory Provisions Involved:
   United States Constitution, Amendment V;
   United States Constitution, Amendment XIV
   Mass. General Laws Chapter 94C,
   Section 32(a);

Mass. General Laws Chapter 94C,
Section 34.

5. Statement of the Case:

Norman C. Gagnon and Philip C. Chouinard were indicted under Massachusetts General Laws Chapter 94C, Section 32(a), which punishes the unlawful possession of heroin with intent to distribute. Prior to trial in the Essex County Superior Court, the Defendants moved the dismissal of the indictments on the grounds that Section 32(a) was unconstitutionally vague and ambiguous in that its penalty clause comprehended two, inconsistent penalty schemes and was therefore void under the Due Process Clauses of the Fifth and Fourteenth Amendments. The Superior Court denied the motions; the Defendants next moved the Court to report the question up for immediate, appellate consideration; this motion too was denied. The Defendants then proceeded to trial, where they were convicted and

sentenced to a term of imprisonment and a fine. Defendants immediately appealed their convictions to the Massachusetts Appeals Court upon the aforesaid grounds.

The Supreme Judicial Court ordered the case up for direct appellate review and, on November 4, 1982, issued a unanimous Judgment and Opinion voiding Section 32(a) and remanding the cases to the Superior Court for dismissal, observing that the Defendants' pre-trial motions to dismiss "should have been granted." Commonwealth of Massachusetts vs. Norman C. Gagnon and Philip C. Chouinard, 387 Mass. 567, 441 NE2d 753 (1982).

The Commonwealth promptly petitioned the Supreme Judicial Court for a re-hearing of the case, urging several grounds therefor. The Court granted a re-hearing solely with respect to the Commonwealth's contention that, even

granting the unconstitutionality of Section 32(a), the indictments need not be dismissed because the cases could be remanded to the Superior Court where the Defendants could be re-sentenced pursuant to Chapter 94C, Section 34, which charges simple possession of heroin. The Supreme Judicial Court invited the Defendants to file a written response to the Commonwealth's argument, which was promptly done.

The Defendants opposed the Commonwealth's position upon the grounds that the procedure thus advocated was unconstitutional. Specifically, the Defendants argued that: (1) to sentence them pursuant to a statute under which they had never been indicted, tried or convicted would violate Due Process of Law under the Fourteenth Amendment; and (2) to subject them to re-sentencing under a statute which charged a lesser offense entirely included within the

offense with which they had been previously charged would constitute impermissible double jeopardy under the Fifth and Fourteenth Amendments.

On December 23, 1982, the Supreme Judicial Court entered an Order reaffirming the unconstitutionality of M.G.L. Chapter 94C, Sec. 32(a) but remanding the cases to the Superior Court for entry of guilty findings and resentencing under Sec. 34. It is from this latter part of the December 23, 1982 Judgment that the Defendants presently appeal. See: Commonwealth of Massachusetts vs. Norman C. Gagnon and Philip C. Chouinard, 387 Mass. 768, 443 NE 2d 407 (1982).

REASONS FOR CONSIDERATION BY THIS COURT

The questions of law raised by the present appeal are so substantial as to require plenary consideration, with briefs and oral argument, for their resolution.

We have found no authority for the proposition that a criminal Defendant may be sentenced pursuant to a statutory provision under which he was never indicted, tried or convicted. The Due Process implications of the Commonwealth's position are ominous: a Defendant may be indicted, tried, convicted and sentenced under a provision later adjudged to be unconstitutional, only to find himself re-sentenced under another statutory provision; following a successful appeal against this second statutory provision, may the State re-sentence him yet again, pursuant to a third statutory provision? Such a result flies in the face of the Due Process guaranty that a Defendant is entitled to clear notice of the offense with which he is charged and the possible range of penalties attendant upon conviction, and an opportunity to defend against the same. Indeed, it was precisely the lack of such notice in M.G.L. Ch. 94C, Section 32(a) which led the Supreme

Judicial Court to void the statute!

There is a second vice in the Commonwealth's position: The case law is reasonably clear upon the point that where a Defendant is convicted and sentenced under one statute, and thereafter - for whatever reason - the State attempts to charge, convict and/or sentence him pursuant to a second statute which charges a lesser offense entirely included within the former charge, such action constitutes impermissible double jeopardy.

Finally, the position advocated by the Commonwealth yields an anomaly: had the Defendants' Motions to Dismiss been granted by the Superior Court, the matters would have ended there - yet winning the same point at the appellate level produces a completely different result, viz.: the Commonwealth is awarded a second opportunity to secure their incarceration!

Clearly, the present appeal presents matters of considerable import, worthy of

consideration by this Court. If the Judgment appealed from is allowed to stand, important constitutional rights vouchsafed by the Fifth and Fourteenth Amendments will be eroded.

Respectfully submitted,

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NOTE: Attorneys Miller and Segal are members of the Bar of the United States Supreme Court and are counsel of record herein upon whom service of process may be made.

COMMONWEALTH vs. NORMAN GAGNON

(and two companion cases).

NOLAN, J. The single issue in this case is the constitutionality of G.L. c. 94C, § 32 (A). We hold that it is unconstitutional.

In February and March, 1981, an Essex County grand jury returned two indictments against Philip C. Chouinard for the unlawful distribution of heroin in violation of § 32 (a) of G. L. c. 94C, the Controlled Substances Act. In May, 1981, the defendants moved to dismiss the indictments on the ground that § 32 (a) "is unconstitutionally vague and ambiguous in that its penalty clause comprehends two inconsistent penalty schemes and is therefore void." The motion was denied on August 3, 1981, following a hearing held on July 29, 1981. The defendants thereafter were convicted as charged, following jury-waived trials on

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1. One is against Norman Gagnon; the other is against Philip C. Chouinard.

November 23, 1981. Chouinard was sentenced to a ten-year term at the Massachusetts Correctional Institution at Concord and fined $500.00. Gagnon was sentenced to two concurrent terms of ten years at M.C.I. Concord and fined $500 on each indictment. The only issue raised by the defendants on appeal is the denial of their motion to dismiss. Their motions should have been allowed.

General Laws c. 94C, § 32 (a), as appearing in St. 1980, c. 436, §4, provides: "Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class A of section thirty-one shall be punished by a term of imprisonment in the state prison for not less than one year and not more than ten years, or by a fine of not less than $1,000 and not more than $10,000, or both. Any person convicted of violating

this subdivision shall be punished by a mandatory minimum one year term of imprisonment." The defendants contend that the second sentence, requiring a "mandatory minimum" term of imprisonment, is so inconsistent with the optional language of the first sentence, which allows punishment by imprisonment, fine, or both, as to make the statute unresolvably ambiguous. The Commonwealth does not dispute the apparent inconsistency, but it argues that a reasonable interpretation of the penalty provisions "in light of their legislative history, the legislature's intent, and the practical meaning of the statute when viewed as a whole and along with related Controlled Substances Act statues, readily establishes the statute's validity."

"It is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" United States v. Batchelder, 442 U.S. 114, 123

(1979), quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). This principle applies to sentencing as well as substantive provisions. United States v. Batchelder, supra. United States v. Evans, 333 U.S. 483 (1948). We are required by ordinary rules of statutory construction to construe any criminal statute strictly against the Commonwealth. Commonwealth v. Clinton 374 Mass. 719, 721 (1978). Commonwealth v. Devlin, 366 Mass. 132, 137-138 (1974). However, we recognize that "this maxim is a guide for resolving ambiguity, rather than a rigid requirement that we interpret each statute in the manner most favorable to defendants." Simon v. Solomon, 385 Mass. 91, 102-103 (1982). We may look to outside sources to determine the meaning of a statute whose language is unclear. Aldoupolis v. Commonwealth, 386 Mass. 260, 264 (1982), cert. denied, 51 U.S.L.W. 3257 (U.S. Oct. 4, 1982) (No. 82-5159). Our purpose is to

determine the Legislature's intent so that we may give effect to it in our construction of the statute. See Commonwealth v. Chretien, Mass. Adv. Sh. (1981) 661, 669-670. While we shall indulge every rational presumption in favor of the statute's validity, Commonwealth v. Lammi, 386 Mass. 299, 301 (1982), any reasonable doubt as to the meaning of the statute or the intention of the Legislature which lingers after an investigation of outside sources must be resolved in favor of the defendants. See Aldoupolis v. Commonwealth, supra at 267. See also 3 C. Sands, Sutherland Statutory Construction § 59.04, at 13 (4th ed. 1974). Since it is conceded that the penalty provisions of § 32 (a) are facially inconsistent, we shall examine the statutory history and context of the section to see whether this inconsistency can be resolved in light of any legislative intention there expressed.

General Laws c. 94C, the Controlled Substances Act (Act), was enacted in 1971.

St. 1971, c. 1071, § 1. It repealed the various sections of G. L. c. 94 which, until then, had regulated the manufacture and distribution of drugs. St. 1971, c. 1071, § 2. Prior to 1971, a judge could suspend the imposition of the sentence of a person convicted on first offense for illegally selling or distributing narcotics, but he could not suspend sentence for those convicted of a second or subsequent offense. G. L. c. 94, §§ 212A, 217, 217E, repealed by St. 1971, c. 1071, § 2.

General Laws c. 94C, § 32, as originally enacted, provided that a person convicted of a first offense involving a class A or B controlled substance "shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one-half years or by a fine of not more than twenty thousand dollars, or both such fine and imprisonment." Those previously convicted of

a felony under the Act or corresponding prior law were subject to punishment by longer State prison terms plus a fine. The language contained in the prior law prohibiting suspension of sentences for second offenses was not included in the Act. However, since a second offense was punishable by a prison term plus a fine, G. L. c. 279, § 1A, prohibited suspension. See note 5 infra.

Amendments to the Act in 1980 (St. 1980, c. 436, § 4) replaced former § 32 with present §§ 32 through 32H, each dealing with specific classes of drugs. Subsection (b) of the present § 32 deals with those previously convicted of the same offense or related offenses in other jurisdictions and provides that they shall "be punished by a term of imprisonment in the state prison for not less than five years and not more than fifteen years. Any person convicted of violating this subdivision shall be punished by a mandatory minimum term of imprisonment of five years in the state prison. A fine of not less than

$2,500 and not more than $25,000 may also be imposed, but not in lieu of the mandatory term of imprisonment, as authorized herein."

General Laws c. 94C, § 32H, provides that a sentence imposed under § 32 (b), and certain other sections of the Act, shall not be "suspended, reduced, or a term of probation served until the defendant shall have served the mandatory term of imprisonment as authorized in said sections." This provision was new in the 1980 amendments although it echoed earlier provisions in the pre-1971 drug laws.

From this history, the Commonwealth concludes that the Legislature clearly intended to distinguish between first and subsequent offenders and to allow suspended sentences for the former. The Commonwealth

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2. The other sections are 32A (b), 32B (b), 32D, 32E or 32F.

3. The Commonwealth also points out that a proposed bill, 1982 Senate Doc. No. 1963, would retain the penalty distinctions between first and subsequent offenders.

therefore asks us to read § 32 (a), in apparent concordance with this intent, as to allow punishment by imprisonment, or fine, or both, and as to provide that no term of imprisonment imposed should be for less than one year although execution could be suspended. It finds particular support for this reading from the facts that the Legislature did not include in § 32 (a) any provision that would preclude either the imposition of a fine in lieu of imprisonment as it had in §§ 32 (b), 32A (b), 32B (b), 32D, 32E, and 32F, and did not include § 32 (a) within § 32H.

We think that such a reading takes insufficient account of what the Legislature did by inclusion of the "mandatory minimum" provision, for the punishment scheme suggested by the Commonwealth would have been in effect without it. The Legislature must be presumed to have been aware of the reach

of G. L. c. 279, §§ 1 & 1A, when it amended § 32. See Aldoupolis v. Common-

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4. General Laws c. 279, § 1, as amended through St. 1975, c. 347, provides inpertinent part: "When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended and that he be placed on probation for such time and on such terms and conditions as it shall fix. When a person so convicted is sentenced to pay a fine and to stand committed until it is paid, the court may direct that the execution of the sentence, or any part thereof, be suspended for such time as it shall fix and in its discretion that he be placed on probation on condition that he pay the fine within such time . . . The provisions of this section shall not permit the suspension of the execution of the sentence of a person convicted of a crime punishable by death or imprisonment for life."

5. General Laws c. 279, § 1A, as amended through St. 1978, c. 478, § 309, provides in pertinent part: "When a person convicted before a court is sentenced to fine and imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended, and that he be placed on probation for such time and on such terms and conditions as it shall fix . . . This section shall not permit the suspension of the execution of the sentence of any person convicted of a crime punishable by imprisonment for life or of a crime an element of which is being armed with a dangerous weapon, or of any person convicted of any other felony if it shall appear that he has been previously convicted of any felony."

wealth, supra at 266; Commonwealth v. King, 202 Mass. 379, 388 (1909). By inclusion of the "mandatory minimum" provision in G. L. c. 94C, § 32 (a), the Legislature might well have intended at least four possible penalty schemes, each of which would be more or less consistent with its evident purpose to treat first offenders more leniently than repeat offenders: (1) at least a one-year sentence with suspension possible; (2) at least a one-year sentence with suspension impossible although payment of any fine imposed could be suspended if not prohibited under G. L. c. 279, § 1A; (3) a fine alone, or imprisonment for at least a year, or both, with suspension possible as to each unless otherwise prohibited; (4) a fine alone, or imprisonment for at least one year, or both, with only the fine suspendible unless otherwise prohibited. Viewed in this light, the statutory history is inconclusive.

As an additional basis for our decision, we note that § 32 (a) apparently would allow

a sentence to State prison for a minimum, indeed a maximum, term of less than two and one-half years. General Laws c. 279, § 24, however, provides that the minimum term of a State prison sentence "shall not be less than two and one half years." Since a felony is defined as " [a] crime punishable by death or imprisonment in the state prison," with all other crimes being misdemeanors, G. L. c 274, § 1, it would appear that § 32 (a) is intended to be a felony provision. However, a person convicted under § 32 (a) and sentenced to less than two and one-half years would thereby stand convicted of a felony for which he could not be sent to State prison. Compare Sheriff of Middlesex County v. Commissioner of Correction, Mass. Adv. Sh. (1981) 1225 (absent special circumstances, judge who sentences defendant to a term of more than two and one-half years may not order him held in custody of county sheriff without sheriff's consent). We need not

decide whether the conflict between G. L. c. 279, § 24, and G. L. c. 94C, § 32 (a), can be resolved. But add to this confusion the ambiguity of the "mandatory minimum" provision, and it is clear to us that this statutory maze provides no notice as to the potential penalties for violation of § 32 (a) here only serves to exacerbate that subsection's inherent ambiguities.

We must give effect to all the language in a statute. Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. 682, 687-688 (1972). Should we accept the construction urged by the Commonwealth, we would be left with a two sentence subsection whose second sentence would be contrary to the otherwise clear meaning of the first sentence. The Commonwealth's reading would not require us to interpret ambiguous language to make the

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6. Proposed legislation contained in Senate Doc. No. 1963 attempts to eliminate this problem by restoring the provisions allowing sentences to a jail or house of correction which were removed in the 1980 amendments.

statute clear but to ignore that language which makes the statute unclear.

What was said in United States v. Evans, 333 U.S. 483, 495 (1948), is pertinent here. "If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in one, resolution of the difficulty by judicial action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large."

There is reasonable doubt about the meaning of G. L. c. 94C, § 32 (a), and the Legislature's intention in passing it. Although we recognize the Legislature's efforts to devise realistic and effective sanctions against illicit drug trafficking, we cannot resolve this doubt in its favor. See Aldoupolis v. Commonwealth, supra at 267. See also 3 C. Sands, supra. General Laws c.

94C, § 32 (a), is void for vagueness. The judgments are reversed and the findings set aside. The case is remanded to the Superior Court and the judge is to enter an order granting the defendant's motion to dismiss.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON

November 4, 1982

In the Case No. SJC - 2894

COMMONWEALTH

VS

NORMAN GAGNON and two companion cases.

pending in the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT for the County of Essex No. 02434, 02560, 02561

ORDERED, that the following entry be made in the docket; viz., -

The judgments are reversed and the findings set aside.

The case is remanded to the Superior Court and the judge is to enter an order granting the defendant's motion to dismiss.

BY THE COURT,

s/Frederick J. Quinlan.
Ass't. Clerk.

Nov. 4, 1982

See opinion on file.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON

November 17, 1982

In the Case No. SJC - 2894

COMMONWEALTH

VS

NORMAN GAGNON and PHILIP CHOUINARD

pending in the SUPERIOR COURT for the County of Essex Nos. 2434, 2560, 2561

ORDER

It is hereby ORDERED, that the Commonwealth's Petition for Rehearing is denied except insofar as it raises in Paragraph III the issue of resentencing under G.L. c. 94C, §34, which defines the lesser included offense of possession.

The defendant may submit a brief or a letter on this issue on or before Wednesday, November 24, 1982.

This action is taken pursuant to M.R.A.P. 27(a), 365 Mass. 844 (1974).

BY THE COURT,

s/Patrick J. Hurley,
Clerk.

November 17, 1982.

COMMONWEALTH vs. NORMAN GAGNON

(and two companion cases [1]).

NOLAN, J. After the Commonwealth filed its petition for rehearing, following the court's opinion reported ante 567 (1982), the court invited the defendants to submit a brief or a letter on the sole issue whether the defendants may be resentenced under G. L. c. 94C, § 34, which punishes, inter alia, possession of heroin. The court has treated the letters from the District Attorney and the Attorney General in support of the petition for rehearing as memoranda of law.

The issue of possession as a lesser included offense within the crime of unlawful manufacture and distribution was not argued originally by the Commonwealth in its brief or at oral argument. However, the

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1. One is against Norman Gagnon; the other is against Philip C. Chouinard.

indictments charge that the defendants did "knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance to wit: Heroin, a class A substance." Under this indictment one who knowingly or intentionally manufactures, distributes or dispenses heroin possesses the heroin, actually or constructively.

The assertion in the dissenting opinion that these defendants can be resentenced under G.L. c. 94C, § 32, as it existed before the comprehensive revision of the drug sentencing laws in 1980 (St. 1980, c. 436) cannot be left unchallenged. The dissenting opinion urges this court to apply a "rule of revival." This argument has not been raised by any of the parties at any point in these proceedings. If we were to follow our usual practice, the issue would be deemed to have been waived by the failure either to brief or argue the point. Mass. R.A.P. 16 (a) (4), as amended, 367 Mass. 921 (1975). Wolfberg v.

Hunter, 385 Mass. 390, 392 n.3 (1982). This principle has special force when, as is the case here, the point has not been raised even in the petition for rehearing.

The Commonwealth's failure to raise the point is understandable. The dissenting opinion is simply wrong in suggesting ("[t]here is some precedent," infra at) that this "rule of revival" has been a part of our jurisprudence. The cases cited in the dissenting opinion deal only with the issue of severability and do not embrace this so-called "rule of revival." Even if it were

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2. A fair statement of our law is that a statute which has been declared unconstitutional is not wholly without effect but is unenforceable, see Lawton Spinning Co. v. Commonwealth, 232 Mass. 28, 36 (1919), unless the objectionable portion can be severed. Del Duca v. Town Adm'r of Methuen, 368 Mass. 1, 13 (1975). Thus, subsequent repeal of an unconstitutional statute which, when read in conjunction with a prior statute rendered the prior statute unconstitutional, served to validate the prior statute. Lawton Spinning Co. v. Commonwealth, supra at 32-35. An amendment which eliminated a constitutionally required exception to a

conceded that these cases hint at some notion of "revival," they did not place the defendants on notice that the former G. L. c. 94C, § 32, would be applied to them. Other than Commonwealth v. Kimball, 299 Mass. 353 (1938), in which the dictum clearly goes to severability, they are all civil cases and, in addition to their age, provide no indication that the "rule of revival" would ever be applied in a criminal case in this Commonwealth.

The fundamental law of the dissenting

State excise tax could be "treated as quite distinct and severable from the prior statutes." Opinion of the Justices, 269 Mass. 611, 615 (1929). An "unimportant exception" to a general prohibition could be severed if the exception were found unconstitutional. Commonwealth v. Kimball, 299 Mass. 353, 360 (1938).

3. The inability of the dissenting judge to cite a single modern decision of this court indicates that it has long been recognized that notions of "revival" have never been applied in our cases.

4. The closest criminal analogy in our cases suggests that "revival" cannot be used to support a conviction for conduct committed after the repeal of a statute but before it has been deemed revived. see Commonwealth v. Marshall, 11 Pick. 350 (1831).

opinion is its unwillingness to face up to the plan consequences of the court's holding. The issue in this case is whether the defendants had sufficient notice of the penalty which attached to their conduct to satisfy due process requirements. Therefore it would be reasonable to expect the dissenting opinion to explain how the "rule of revival" provided these defendants with adequate notice of their punishment.

It is quite apparent that the application of the "rule of revival" in this case would be unconstitutional. These convictions can be upheld only if the prior G. L. c. 94C, § 32, provided adequate notice of the penalty which attached to the defendants' conduct. To reach that conclusion, we would have to reason,

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5. Focusing mainly on the possible State prison sentences, we note that the minimum State prison sentence under prior G. L. c. 94C, § 32, is two and one-half years and under new G. L. c. 94C, § 32 (a), the minimum sentence is one year. We view that difference as significant.

first, that the new G. L. c. 94C, § 32 (a), gave adequate public notice of its own invalidity and, second, that the public, thus informed, was then put on further notice that the apparent repeal of the old § 32 was ineffective. See United States ex rel. Clark v. Anderson, 502 F.2d 1080, 1082 (3d Cir. 1974). Neither of these elements is satisfied here.

Certainly, the Commonwealth would not accept the proposition that the statute gave notice of its own invalidity. It has argued throughout these proceedings that the statute is constitutional. The trial judge also shared that view. In these circumstances, it

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6. The dissenting opinion states that the reasoning of the Anderson case "does not apply here," infra at , since that case dealt with notice of proscribed conduct. Our holding, however, makes clear that the "fundamental tenet of due process that '[n]o one may be required . . . to speculate as to the meaning of penal statutes'" applies "to sentencing as well as substantive provisions." Commonwealth v. Gagnon, 387 Mass. 567, 569 (1982), quoting United States v. Batchelder, 442 U.S. 114, 123 (1979).

cannot be said that the public had any notice that the apparent repealof the prior statute was ineffective. Since the "rule of revival" has not been adopted by this court, the defendants had no adequate notice of the penalty attaching to their conduct.

Due to the dearth of Massachusetts authority in favor of "revival," the dissenting opinion necessarily falls back on the citation of cases from other jurisdictions. None of these cases, however, supports the application of a "rule of revival" in the present circumstances. The cases (1) reach results inconsistent with revival, e.g., Davis v. Wallace, 257 U.S. 478, 484-485 (1922) (where an excepting provision is declared unconstitutional, preexisting law cannot be applied to persons within the exception); (2) relate only tangentially to the instant case, e.g.,

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7. The dissenting opinion does not tell us how these cases provided adequate notice to the defendants in this case of the penalty attaching to their conduct.

Chicago, I. & L. Ry. v. Hackett, 228 U.S. 559, 566 (1913) (an unconstitutional Federal statute does not preempt State law); or (3) do not address the present circumstances, e.g., State v. Collins, 528 S.W. 2d 814, 815 (Tenn. 1975) (defendant convicted and sentenced under statute in effect at time of his criminal conduct). Moreover, some of the jurisdictions that have adopted a "rule of revival" have held that a person cannot be convicted for a crime committed during the period which elapses between the "attempted" repeal of the criminal statute under which the defendant was charged and the pronouncement of unconstitutionality of the repealing statute by court decision. See Lutwin v. State, 97 N.J.L. 67 (1922). This is not unlike the situation here.

The "rule of revival" has little merit.

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8. Thus the rule is applied in other jurisdictions prospectively from the decision of the court to void the superseding statute. See State v. Kolocotronis, 73 Wash. 2d 92, 104-105 (1968).

In the present setting, its application would be a form of judicial lawmaking. The amendments to the act in 1980 (St. 1980, c. 436, § 4), worked a comprehensive revision of the former G. L. c. 94C, § 32, and it would be sheer speculation to say what penalty the Legislature would have enacted had the lawmakers known of the result in this case. That they would have provided for some penalty does not tell us what that penalty would have been. United States v. Evans, 333 U.S. 483, 495 (1948) (clear intent to punish proscribed conduct does not authorize court to fix a penalty where the statute is too uncertain). See also Mayor of Boston v. Treasurer & Receiver Gen., Mass. Adv. Sh. (1981) 2351, 2364 (Hennessey, C. J., dissenting) (where Legislature had any number of alternatives available to it, it is sheer

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9. The point is highlighted by our inability to determine the intent of the Legislature when it enacted the 1980 amendments. See Commonwealth v. Gagnon, supra at 569-574.

conjecture to say that one of these alternatives would not have been adopted). It is not for this court to establish criminal penalties. The opinion of the court therefore eschews this "rule of revival."

The judgments are reversed in so far as the indictments charge violations of G. L. c. 94C, § 32 (a), and the findings of the judge are set aside in so far as they find the defendants guilty of such violations. The cases are remanded to the Superior Court, where the judge is to enter an order dismissing the indictments except as to the lesser included offense of possession of heroin. Findings of guilty of that offense may be entered, and the defendants may be sentenced pursuant to G. L. c. 94C, § 34, which punishes the possession of heroin.

So ordered.

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10. The Commonwealth's motion to stay the issuance of a rescript is denied.

HENNESSEY, C.J. (dissenting). I dissent from the majority's decision that the defendants may now be punished only for the lesser included offense of possession of heroin. I would apply the "rule of revival" and order that the defendants be resentenced for the more serious crime of which they were convicted, unlawful distribution of heroin, under the law as it existed before the 1980 revision of G. L. c. 94C, § 32.

General Laws c. 94C, § 32, was enacted in 1971. Pursuant to that statute, the manufacture, distribution, or dispensation of a class A or class B controlled substance, or the possession of such substance with the intent to manufacture, distribute, or dispense was punishable on first offense by

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1. The Chief Justice was not originally a participant in this matter, but was invited to join the quorum after issuance of the court's opinion, and after the Commonwealth filed a petition for rehearing. Justice Wilkins and Justice Lynch at an early state in the proceedings each disqualified himself from participation in the case.

imprisonment (not more than ten years in State prison or not more than two and one-half years in a jail or house of correction), by fine, or both. In 1980, § 32 was replaced by nine new sections, §§ 32 through 32H, each dealing more or less with a specific class of drugs. St. 1980, c. 436, § 4. We are concerned in this case with a class A controlled substance (heroin). The 1980 statutory revision made no change in the status of heroin as a class A controlled substance or in the proscribed conduct. The only changes related to the punishments.

I agree with the majority that § 32 (a) is unconstitutional because the punishments as revised in that 1980 enactment are vague, uncertain, and confusing. I also agree that the defendants may now properly be punished for the lesser included offense of mere possession, since the controlling statute there (G. L. c. 94C, § 34) is constitutional in all respects. But this court should go farther and order that the defendants be

resentenced under the rule of revival. This rule is simply that the unconstitutional amendment was void from its inception, and consequently never took effect to supersede the prior statute.

There is some precedent to indicate that this rule has long been part of the law in this Commonwealth. See Commonwealth v. Kimball, 299 Mass. 353 (1938); Opinion of the Justices, 269 Mass. 611 (1929); Lawton Spinning Co. v.Commonwealth, 232 Mass. 28 (1919). Further, it is the established rule in other jurisdictions. State v. Bloss, 637 P.2d 1117 (Hawaii 1981). State v Books, 225 N.W.2d 322 (Iowa 1975). State v. Dixon, 530 S.W.2d 73 (Tenn. 1975). State v. Collins, 528 S.W.2d 814 (Tenn. 1975). State v. Koloctronis, 73 Wash. 2d 92 (1968). See Frost v. Corporation Comm'n of Oklahoma, 278 U.S. 515, 525-528 (1929); Davis v. Wallace, 257 U.S. 478, 485 (1922); Chicago, I. & L.Ry. v. Hackett, 228 U.S. 559, 566 (1913); People

v. Fox, 294 Ill. 263 (1920). It is true that one case has held that the revival rule could not constitutionally be invoked because, in the circumstances there presented, the defendant did not have sufficient notice of the criminality of his conduct to satisfy the due process requirements of the Federal Constitution. United States ex rel. Clark v. Anderson, 502 F.2d 1080 (3d Cir. 1974). That reasoning clearly does not apply here. It would border on the frivolous for the defendants or any other persons to argue that they were not on notice that, at all relevant times, distribution of heroin was and is a criminal offense in this Commonwealth. Nor could the defendants reasonably argue that they were ever in any uncertainty as to the precise crime charged against them. In light of these factors, all the majority's reasoning, whether premised in the Constitution or in policy, fails.

There is no persuasive reason why the rule of revival should not apply here. I

have no doubt that this would be consistent with legislative intent. There is every reason to believe that the Legislature would prefer to revive the former statute, rather than have a substantial period of time in which the reprehensible conduct involved here was not a criminal offense. I would remand this case to the Superior Court for resentencing of the defendants for the crime of distribution of heroin under G. L. c. 94C, § 32, as enacted in 1971.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

AT BOSTON

December 23, 1982

IN THE CASE NO. SJC - 2894

COMMONWEALTH

vs.

NORMAN GAGNON (and two companion cases) pending in the SUPERIOR COURT DEPARTMENT OF THE TRIAL Court for the County of ESSEX, No. 02434, 02560, 02561.

ORDERED, that the following entry be made in the docket; viz., -

The judgments are reversed in so far as the indictments charge violations of G. L. c. 94C, § 32 (a), and the findings of the judge are set aside in so far as they find the defendants guilty of such violations. The cases are remanded to the Superior Court, where the judge is to enter an order dismissing the indictments except as to the lesser included offense of possession of

heroin. Findings of guilty of that offense may be entered, and the defendants may be sentenced pursuant to G. L. c. 94C, § 34, which punishes the possession of heroin.

BY THE COURT,

s/Frederick J. Quinlan
Ass't. Clerk.

Dec. 23, 1982

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS

CHAPTER 94C.

SECTION 32. Unauthorized Manufacture, Distribution, etc. of Class A Substances; Penalties.

(a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class A of section thirty-one shall be punished by a term of imprisonment in the state prison for not less than one year and not more than ten years, or by a fine of not less than $1,000 and not more than $10,000, or both. Any person convicted of violating this subdivision shall be punished by a mandatory minimum one year term of imprisonment.

SECTION 34. Unauthorized Possession; Penalties; Dismissal and Sealing of Record in Certain Cases of First Offense.

No person knowlingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. Except as hereinafter provided, any person who violates this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment. Any person who violates this section by possessing heroin shall for the first offense be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both, and for a second or subsequent offense shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years or by

a fine of not more than five thousand dollars and imprisonment in a jail or house of correction for not more than two and one-half years. Any person who violates this section by possession of marihuana or a controlled substance in Class E of section thirty-one shall be punsihed by imprisonment in a house of correction for not more than six months or a fine of five hundred dollars, or both. Except for an offense involving a controlled substance in Class E of section thirty-one, whoever violates the provisions of this section after one or more convictions of a violation of this section or of a felony under any other provisions of this chapter, or of a corresponding provision of earlier law relating to the sale or manufacture of a narcotic drug as defined in said earlier law, shall be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both.

If any person who is charged with a

violation of this section has not previously been convicted of a violation of any provision of this chapter or other provision of prior law relative to narcotic drugs or harmful drugs as defined in said prior law relative to narcotic drugs or harmful drugs as defined in said prior law, or of a felony under the laws of any state or of the United States relating to such drugs, has had his case continued without a finding to a certain date, or has been convicted and placed on probation, and if, during the period of said continuance or of said probation, such person does not violate any of the conditions of said continuance or said probation, then upon the expiration of such period the court may dismiss the proceedings against him, and may order sealed all official records relating to his arrest, indictment, conviction, probation, continuance or discharge pursuant to this section; provided, however, that departmental records which are not public

records, maintained by police and other law enforcement agencies, shall not be sealed; and provided further, that such a record shall be maintained in a separate file by the department of probation solely for the purpose of use by the courts in determining whether or not in subsequent proceedings such person qualifies under this section. The record maintained by the department of probation shall contain only identifying information concerning the person and a statement that he has had his record sealed pursuant to the provisions of this section. Any conviction, the record maintained by the department of probation shall contain only identifying information concerning the person and a statement that he has had his record sealed pursuant to the provisions of this section. Any conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of any disqualification or for any other purpose. No person as to whom such sealing has been

ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose.

Notwithstanding any other penalty provision of this section, any person who is convicted for the first time under this section for the possession of marihuana or a controlled substance in Class E and who has not previously been convicted of any offense pursuant to the provisions of this chapter, or any provision of prior law relating to narcotic drugs or harmful drugs as defined in said prior law shall be placed on probation unless such person does not consent thereto, or unless the court files a written memorandum stating the reasons for not so

doing. Upon successful completion of said probation, the case shall be dismissed and records shall be sealed.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss: SUPREME JUDICIAL COURT
No. SJC - 2894

COMMONWEALTH OF MASSACHUSETTS

vs.

NORMAN C. GAGNON and
PHILIP C. CHOUINARD,

Defendants

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

NOTICE is hereby given, pursuant to U.S. Supreme Court Rules 10 and 11, that Defendants Norman C. Gagnon and Philip C. Chouinard will forthwith APPEAL that portion of the Judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in the above entitled matter on December 23, 1982, which provides that:

> Findings of guilty of (the lesser included offense of possession of heroin) may be entered, and the defendants may be sentenced pursuant to

G.L. c. 94C, Sec. 34, which punishes the possession of heroin.

This APPEAL is taken pursuant to 28 U.S.C. 1257(2) and 28 U.S.C. 2102.

Respectfully submitted,
Norman C. Gagnon and
Philip C. Chouinard,
By their attorneys,

s/Bruce Miller/mec
Bruce Miller, Esq.
ALOISI & ALOISI
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(617) 927-2211
Attorney for
Appellant
Norman C. Gagnon

s/Jerome A. Segal/mec
Jerome A. Segal, Esq.

s/Michael Edward Casey
Michael Edward Casey,Esq
SEGAL, EDELSTEIN &
BUSSONE
21 Broadway
Beverly, MA 01915
(617) 927-2211
Attorneys for Appellant,
Philip C. Chouinard

DATED: January 28, 1983

AFFIDAVIT OF SERVICE

I, Jerome A. Segal, hereby certify,pursuant to United States Supreme Court Rules 28(3) and 5(c), that on January 28, 1983, I mailed, via postage pre-paid certified mail, return receipt requested, three (3) copies of the above NOTICE OF

APPEAL to:

1. District Attorney Kevin M. Burke
   Essex County District Attorney's Office
   One Brown Street Court
   Salem, MA 01970

and

2. Attorney General Frances X. Bellotti
   One Ashburton Place
   Boston, MA 02108

I further certify that all parties herein required to be served by the applicable Rules of the United States Supreme Court have been served as set forth hereinabove.

Signed this twenty-eighth (28th) day of January, 1983, under the pains and penalties of perjury,

s/Jerome A. Segal/mec
Jerome A. Segal, Esquire

No. 82-1558

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

NORMAN C. GAGNON and
PHILIP C. CHOUINARD,
Appellants

V.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

ON APPEAL FROM A JUDGMENT
OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

MOTION TO DISMISS

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BARBARA A.H. SMITH
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Statutes

No. 82-1558

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

NORMAN C. GAGNON and
PHILIP C. CHOUINARD,
Appellants

V.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

ON APPEAL FROM A JUDGMENT
OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

MOTION TO DISMISS

Appellee moves to dismiss this appeal pursuant to Rule 16 of the Rules of the Supreme Court of the United States, on the grounds that it is not within this Court's jurisdiction; the federal questions sought to be reviewed were not properly raised below and were not decided by the court below; the

judgment below rests on adequate non-federal bases; and the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

This is an appeal from a judgment of the Massachusetts Supreme Judicial Court entered after a rehearing in a criminal case. In its initial judgment, the Supreme Judicial Court held that appellants' motions to dismiss indictments charging possession of heroin with intent to distribute should have been granted because of unconstitutional vagueness in the penalty provisions of the statute proscribing such conduct. Accordingly, the court reversed the convictions and remanded the case to the trial court for entry of an order granting the motions to dismiss.

However, after rehearing the case at the Commonwealth's request, the Supreme Judicial Court ordered reversal of the convictions and dismissal of the indictments except as to the lesser included offense of possession of heroin, with respect to which crime the court held that findings of guilty might be entered and sentences imposed.

By this appeal, appellants challenge the constitutionality of their being found guilty and sentenced for the lesser included offense. They do not challenge the constitutionality of the statute proscribing the lesser offense, nor do they challenge the state court's conclusion that possession of heroin is a lesser included offense of possession with intent to distribute.

ARGUMENT

I. THE APPEAL IS NOT WITHIN THIS COURT'S JURISDICTION

As one of the statutory bases for this appeal, appellants purport to rely on 28 U.S.C. §1257(2), which allows review by this court of a state court decision in favor of the validity of a state statute. However, in the court below there is no decision in favor of the validity of a state statute. To the contrary, the court struck down the state statute (Mass. Gen. Laws ch. 94C, §32(a)) which made criminal the possession of heroin with intent to distribute. This was the result appellants sought, and they do not seek review of this aspect of the decision. It is the court's decision on rehearing which is challenged by this appeal. At that stage of the proceeding, the only

question before the court was whether appellants could be resentenced for possession of heroin, under Mass. Gen. Laws, ch. 94C, §34. Appellants did not then, nor do they now, draw into question the validity of that statute. It is therefore clear that 28 U.S.C. §1257(2) does not confer jurisdiction over this appeal.

As an alternative statutory basis for appeal, appellants cite 28 U.S.C. §2102. Since that statute deals only with the priority of cases in this court, it obviously does not confer jurisdiction over this appeal.

Appellee is aware that this improvidently taken appeal might be regarded and acted on as a petition for writ of certiorari, pursuant to 28 U.S.C. §2103. If so, it is requested that the following arguments in support

of this motion to dismiss the appeal be regarded as reasons for denying the petition.

II. APPELLANTS FAILED TO RAISE THE FEDERAL QUESTIONS IN THE STATE COURT

The opinion of the Supreme Judicial Court on rehearing contains no reference to the federal questions appellants seek to bring to this Court. In these circumstances, it will be assumed that the state court's failure to pass upon the federal questions was due to want of proper presentation to that court, unless the aggrieved party can affirmatively show the contrary. See, e.g., Street v. New York, 394 U.S. 576, 582 (1969). In an apparent effort to meet their burden, appellants assert that they made the following arguments in the Supreme Judicial Court:

> (1) to sentence them pursuant to a statute under which they had never been indicted, tried or convicted would violate Due Process of Law under the Fourteenth Amendment; and (2) to subject them to re-sentencing under a statute which charged a lesser offense entirely included within the offense with which they had been previously charged would constitute impermissible double jeopardy under the Fifth and Fourteenth Amendments.

(Jurisdictional Statement, pp. 11-12). However, examination of appellants' submissions to the state court (which are reprinted in the appendix to this motion), reveals that these broad claims were not made, and were not passed on by the court.

Gagnon made only passing reference to "our historical notions of due process." (App. A). He did not cite the federal constitution, nor did he cite cases which expressly relied on the federal constitution. The Massachusetts Constitution contains a provision in

Article 12 which "embrace[s] all that is comprehended in the words 'due process of law' in the Fourteenth Amendment." Pugliese v. Commonwealth, 335 Mass. 471, 475, 140 N.E.2d 476 (1957). Thus, the "historical notions of due process" which appellants sought to invoke should be deemed to relate to the state constitutional protection. Since the record does not clearly show that the state court had the opportunity to decide the federal question in the first instance, that question is not properly before this court. See, e.g., Webb v. Webb, 451 U.S. 493 (1981).

The context in which the due process claim was raised further demonstrates that the decision below resolved only a question of state law. Gagnon argued that simple possession was not a lesser included offense of possession with

intent to distribute. He asserted that the possession element of the greater offense required a connection with the intended distribution, and that these two elements were "indivisible." In his view, the relief sought by the Commonwealth would require the court to "dissect and comingle or butcher portions of separate statutes." Thus, he claimed that he had never been indicted, tried or convicted for the offense of simple possession, and had not been able to prepare a defense to that crime. The alleged due process violation was premised on this analysis. Consequently, the due process claim dissolved when the state court rejected appellants' analysis of state law. Since an indictment and conviction for a greater offense comprehends all lesser included offenses, Commonwealth

v. Gosselin, 365 Mass. 116, 118, 309 N.E. 2d 884 (1974), there was nothing remaining to the due process claim once the state law issue was resolved as it was.

Chouinard made no reference to due process. He did, however, assert a claim of a Fifth Amendment double jeopardy violation. In contrast to Gagnon, Chouinard conceded that the two crimes at issue constituted the same offense. Asserting that defendants had already served a period of incarceration as a result of their conviction of the greater offense, he claimed that re-sentencing for the lesser offense "would constitute a clear violation of the constitutional guaranty against 'multiple punishments for the same offense.'" (Appendix B). This claim did not have to be considered by the state

court because its merit obviously would depend on action to be taken in the future. If on re-sentencing the defendants were given credit for time served, there clearly would be no basis for a claim of multiple punishment. Thus, if the claim of a double jeopardy violation asserted in this appeal is the same as that raised below regarding multiple punishment, it cannot be concluded that this federal claim was resolved by the state court. For the same reason that the claim was premature in the state court, so too, it is not ripe for a decision by this Court either.

No other argument regarding double jeopardy was advanced by Chouinard, and none was suggested by Gagnon. Thus, there is no federal question concerning the double jeopardy clause properly before this Court.

III. THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Appellants suggest three reasons why this court should grant plenary consideration of this appeal. Each is wholly without merit. Appellants first assert that it would violate due process to sentence them pursuant to a statute under which they were never indicted, tried or convicted. This argument overlooks the well-settled principle that "when an indictment charges an offense which includes within it another lesser offense, ... the accused ... may be convicted of the lesser [offense]." Commonwealth v. Gosselin, 365 Mass. 116, 118, 309 N.E.2d 884 (1974). Thus, as noted supra, the due process claim does

not survive the Supreme Judicial Court's holding that possession of heroin is a lesser included offense of possession of heroin with intent to distribute.

Appellant's second argument asserts that "[t]he case law is reasonably clear" that once a defendant has been convicted of a greater offense, a state's attempt to prosecute him for lesser offense, "for whatever reason," constitutes impermissible double jeopardy. But, of course, whether the second prosecution is barred depends entirely on the reason it is being brought. It is a "venerable principle[] of double jeopardy jurisprudence" that "[t]he successful appeal of a judgment of conviction, on any ground other than

the insufficiency of the evidence to support the verdict, ... poses no bar to further prosecution on the same charge." United States v. Scott, 437 U.S. 82, 90-91 (1978). See also, e.g., United States v. DeFrancesco, 449 U.S. 117, 131 (1980); United States v. Tateo, 377 U.S. 463, 465 (1964). Even where a conviction must be reversed for insufficiency of the evidence, there is no constitutional bar to entry of a verdict of guilty of any lesser included offense as to which the evidence was sufficient. See, e.g., Dickenson v. Israel, 482 F.Supp. 1223, 1225-26 (E.D. Wis. 1980), aff'd., 644 F.2d 308 (7th Cir. 1981). It stands to reason that the double jeopardy clause poses no bar

to a defendant's conviction and sentencing for a lesser offense where he has successfully appealed his conviction of the greater on the grounds that the penalty was unconstitutionally vague. A Supreme Court pronouncement of this obvious principle is unnecessary.

Appellants' final argument is that the state court's decision yields an anomaly, in that if the Motion to Dismiss had been granted by the trial court, "the matters would have ended there." However, there is no basis for this assumption. Just as the Supreme Judicial Court after trial ordered dismissal of the indictments except as to the lesser offense, so too, the trial court could have done the same before

trial, with no difference in result. Thus, there is no "anomaly" to be considered by this Court.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

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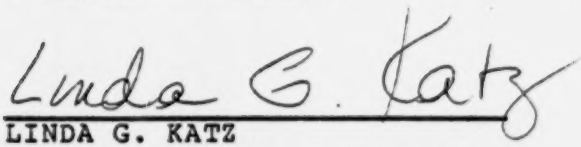

LINDA G. KATZ
Assistant Attorney General

APPENDIX A

November 23, 1982

Honorable Edward F. Hennessey
Chief Justice
Supreme Judicial Court
New Courthouse
Pemberton Square
Boston, Massachusetts 02108

RE: COMMONWEALTH V. NORMAN GAGNON, ET AL
S.J.C. NO. 2894

Dear Chief Justice Hennessey:

Pursuant to Order of this Honorable Court, the Defendant, Norman Gagnon, chooses to submit this letter in opposition to the Commonwealth's contention that the remedy upon finding that Chapter 94C, §32(a) is void for vagueness should not be the dismissal of the indictments but rather should be, "... an Order of Dismissal on so much of the indictment as charges the Defendant with distribution of or the intent to distribute heroin, and remand the case

to the Trial Court for resentencing pursuant to Chapter 94C, §34, on the lesser included offense of possession of heroin, a statute which has not been rendered unconstitutional on any basis ..."

This argument, which is advanced now for the first time, is based on the assumption that simple possession of heroin, which is proscribed under §34 of Chapter 94C, is a lesser included offense under §32(a). The Defendant, Gagnon, respectfully suggests that upon an analysis of the purpose and wording of §32(a), that assumption is incorrect.

The graveman of §32(a) of Chapter 94C is <u>distribution</u> of heroin. It is directed against the drug "pusher", however, the essence of §34 is <u>simple possession</u>, and is directed against the "user" or the "addict". The conduct

proscribed in §32(a) simply does not contemplate or prohibit mere possession or simple possession. The possession contemplated in §32(a) is that kind which is necessary to put the substance into the regular channels of commerce. It is the marketing of such substances that the statute attempts to reach and possession referred to therein must bear a rational relationship to the objective of this statute, namely, proscription of the manufacture, distribution and dispensing of heroin. It is not every type of possession that constitutes a crime under this statute, but only that type incidental to and necessary to effect the delivery of said substance, with intent to transfer title to said substance, and thus, if a person were in possession for his personal use, an indictment under this statute, even if

it were a valid enactment, upon a failure of any evidence of intent to distribute, could not legally result in a conviction for possession, because the possession would have no connection with an intended distribution. The two elements are indivisible and together constitute the offense. Failure of concurrence can not be converted into separate crimes under the familiar rule contained in the case of Commonwealth v. Ancillo, 350 Mass. 427, 430 (1966).

Furthermore, it appears that the Commonwealth is alleging that a finding of simple possession of heroin is implicit in a conviction under G.L.c.94C, §32(a), however, the wording of that section proscribes two separate modes of criminal conduct, one of which is possession with the intent to manufacture, distribute or dispense, and

the other is to knowingly or intentionally manufacture, distribute or dispense heroin.

The indictment in this case was drawn in the alternative, permitting the fact finder to convict either on a theory of distribution or possession with intent to distribute. Plainly, possession is not a lesser included charge of distribution. Commonwealth v. Tripp.[1/] The manufacture, distribution or dispensing of heroin does not necessarily involve possession of the same. One can manufacture heroin without having it in one's possession by ordering employees, servants or agents to process the same. One can distribute

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1/ Commonwealth v. Tripp, 14 Mass. App. Ct. 997 (1982), cited by the Commonwealth is inapposite. In Tripp, the defendant was charged only with possession with intent to distribute.

it by order or direction, either verbal or written, by telephone, through a messenger, by rail, air or sea, without ever possessing the same.

Because it is not possible, "to probe the mental processes of the [fact finder]," Commonwealth v. Wilson, 1980 Mass. Adv. Sh., 1627, 1662, there is no way to determine upon which theory the Defendant was convicted. "Ambiguities and doubts are to be resolved in favor of the accused." Commonwealth v. Wilson, supra at 1661. Since the Defendant's conviction under §32(a) could have been based upon his distribution of the substance without actually possessing it, mere possession is not necessarily an element of the offense for which he was convicted. Consequently, possession is not a lesser included offense, since a lesser included offense is one that is

necessarily included in the offense as charged. Commonwealth v. Rodriguez, 1982 Mass. App. Ct. Adv. Sh. 1103, 416 N.E. 2d, 540 (1981). See also Commonwealth v. Mott, 2 Mass. App. 47, 53-54, 308 N.E. 2d 557 (1974). Morey v. Commonwealth, 108 Mass. 433, 434 (1871). Because the Defendant may have been convicted of a crime which does not comprehend the lesser charge suggested by the Commonwealth, he is entitled to a dismissal of the entire charge.

The Defendant has already served nearly one year in jail, a sentence more appropriate for a felony than a misdemeanor. Because the sentencing provisions of §32(a) have been declared void, rendering the entire statute unconstitutional, the Commonwealth now argues that this Honorable Court should dissect and comingle or butcher portions

of separate statutes and resentence the Defendant under the sentencing provisions of §34 charging simple possession, a misdemeanor, without ever having been indicted, tried or convicted under it, and, of course, without ever having been able to prepare a defense to it. Nothing could be more repugnant to our historical notions of due process. In the case of Commonwealth v. Eaton, 2 Mass. App. Ct. 113 (1974), it was argued that to be charged under one statute and convicted of and sentenced under a totally separate crime under a different statute poses grave problems in light of the due process requirement that a Defendant be given notice of the charges against him and an opportunity to defend himself. "It is elementary in the criminal law of this Commonwealth that the offense must not only be proved as

charged, but it must be charged as proved." Commonwealth v. Ancillo, supra, at 430, citing Commonwealth v. Blood, 4 Gray 31, 33 (1855). By not charging the Defendant with simple possession and only charging under §32(a), the Commonwealth has limited the scope of it's indictment to the manufacture, ... or possession with the intent to manufacture, distribute or dispense, and consequently, is not entitled to a conviction based on simple possession (emphasis added). See Commonwealth v. Collardo, 13 Mass. App. Ct. 901, 433 N.E. 2d 487 (1982) wherein the Defendant was indicted under the statute prohibiting the possession of burglarious tools, and the Commonwealth was prevented from obtaining a conviction based on the fact that Defendant possessed master keys which is

a crime covered under a statute separate and distinct from the one under which he was convicted.

Also, the Commonwealth admits in its Petition for Rehearing that this particular issue was, "... not briefed prior to argument or raised by the Court or the parties in oral argument."

The general rule in this Commonwealth is that issues not raised at trial or pursued in available appellate proceedings are waived. Commonwealth v. Pisa, 372 Mass. 590, 425 N.E. 2d 290 (1981). See also Commonwealth v. Bookman, 386 Mass. 657 at 665 (1982).

The sentencing provision of c. 94C, §32(a) applies to both the manufacture, distribution and dispensing of heroin and the possession with intent to manufacture, distribute or dispense

heroin. The entire sentencing provision, having been held void for vagueness, renders the entire statute violative of the due process clause and, therefore, unconstitutional. Consequently, it would be inconsistent with and repugnant to that holding to allow an indictment under that tainted and unconstitutional statute to serve as the basis of a criminal conviction of an allegedly lesser included offense, especially in light of the fact that the Commonwealth is free to bring new indictments under the appropriate constitutional statute against the Defendant, or any other person or persons who have been indicted or convicted under §32(a), which is unconstitutional.

For the above reasons, it is respectfully suggested that the initial

ruling of this Court ordering the Superior Court to allow the Defendants' Motion to Dismiss the indictments against the Defendant was the correct and appropriate remedy and remains the proper remedy in light of it's ruling that the Defendants were indicted and convicted under an unconstitutional statute, and it is respectfully requested that said Order remain in full force and effect, without modification or change, and that the rescript issue forthwith.

Respectfully submitted,

ALOISI & ALOISI

Bruce Miller
Attorney for the Appellant,
Norman Gagnon

BM/js
cc: Dyanne Klein Polatin
Assistant District Attorney
Jerome Segal, Esquire

APPENDIX B

November 24, 1982

Honorable Edward F. Hennessey
Chief Justice
Supreme Judicial Court
New Court House
Boston, MA 02108

Re: Commonwealth vs. Gagnon
and Chouinard
Supreme Judicial Court No. 2894

Dear Chief Justice Hennessey:

Thank you for affording Defense Counsel an opportunity to respond to the Commonwealth's letter of November 10, 1982, concerning the above-cited matter and seeking re-hearing thereof. From the Order of November 17, 1982, we understand that our remarks are to be directed to Paragraph III of the said letter.

The Commonwealth argues that even granting the unconstitutionality of M.G.L. Ch. 94C, Sec. 32(a),

> the remedy should not be the dismissal of the indictments. Rather, this Court could enter an order of dismissal on so much of the indictments as charge the defendants with distribution of, or the intent to distribute, heroin and remand the cases to the trial court for resentencing pursuant to C. 94C, Sec. 34, on the lesser included offense of possession of heroin.

The sole authority cited in support of this contention is Commonwealth vs. Tripp, 14 Mass. App. Ct. 997 (1982); a perusal thereof quickly reveals that it is inapposite.

Tripp arose out of a Trial Judge's denial of Defendant's Motion for a Required Finding of Not Guilty on that portion of a charge of possession with intent to distribute which charged intent to distribute. Defendant argued that the evidence adduced at trial was insufficient as a matter of law to support the charge of intent to distribute. The Appeals Court agreed

with the Defendant and remanded the case to the trial court for entry of a Not Guilty finding on the charge of intent to distribute and resentencing on the finding of possession. Tripp is consistent with previously existing law; it broke no new legal ground:

> It has long been settled that a person can be complained of for a particular crime and convicted of a lesser included crime under the same complaint.

Commonwealth vs. Munoz, Mass. App., 413 N.E. 2d 773 (1980), rev'd in part, 426 N.E. 2d 1161. Indeed, the indictment may be amended as late as the day of trial to state the lesser included offense; Commonwealth v. Munoz, supra; Commonwealth vs. Sitko, 372 Mass. 305 (1977), appeal after remand, 379 Mass. 921 (1980). It is to be observed that in none of these cases was the statute under which the Defendant was indicted

and tried subsequently invalidated; Tripp, as we have observed, concerned itself solely with a question of evidentiary sufficiency.

The instant case, by contrast, is one in which the very statute under the authority of which the Defendants were indicted, tried and convicted was subsequently voided upon a finding of unconstitutionality. The statute being unconstitutional, it follows that the proceedings thereunder were also invalid:

> There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be elegated authority, contrary to the tenor of the commission under which it is exe of the judicial tribunals to adhere to the latter and disregard the former.

Hamilton, The Federalist, No. 78 (emphasis added); accord: Norton vs. Shelby County, 118 U.S. 425 (1886):

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it never had been passed.

The Norton language has been subsequently modified by the Supreme Court, but chiefly to avoid having to apply all such constitutional decisions retroactively; see e.g. Lemon vs. Kurtzman, 411 U.S. 192 (1973). The statutory basis for the legal proceedings herein having been pronounced void, it follows perforce that those proceedings were invalid.

Were this Court to adopt the suggestion of the Commonwealth, a constitutional anomaly would be produced: proceedings under a void

statute affording a basis for a legitimate sentence! We have found no authority, and the Commonwealth cites none, authorizing such a result. We are not concerned here with the question of whether the Commonwealth could re-indict the Defendants under Sec. 34; nor with that of whether the Commonwealth could have amended the original indictments prior to, or at, the trial of the Defendants, to state a cause of action under Sec. 34. (We note in passing, relative to the latter question, that the Commonwealth was put on notice, prior to trial, of the Defendants' constitutional objections to Sec. 32 (a) and had ample opportunity to amend the indictments or to join the Defendants in their request that the question be reported for a decision; the Commonwealth chose to do neither and

elected to proceed to trial on the indictments as they stood.) The sole question here is whether the Defendants, having gone through the entire process of indictment-trial-conviction-sentencing and having successfully challenged the statutory basis for that process, may now be re-sentenced; we believe that the answer, clearly, must be "No."

There is another problem inherent in the Commonwealth's suggestion -- that of double jeopardy:

> The Fifth Amendment guaranty against double jeopardy protects not only against a second prosecution for the same offense but also against multiple punishments for the same offense.

Gallinaro vs. Commonwealth, 362 Mass. 728 (1973). It has been decided that, at least for double jeopardy purposes, "the charge of possession of heroin and

possession of heroin with intent to distribute constitute the same offense"; Commonwealth v. Clemmons, 370 Mass. 288 (1976). The Defendants herein have served nearly a year in prison as a result of their conviction under Sec. 32(a). From the above-cited cases, it follows that to remand their cases now for re-sentencing under Sec. 34 would constitute a clear violation of the constitutional guaranty against "multiple punishments for the same offense."

Finally, we contend that, whatever merit there might be in the Commonwealth's suggestion, by its failure to brief or argue the point on appeal, the Commonwealth has waived consideration of the same by the Court.

For all of the above reasons, the Defendants respectfully contend that this Court was correct in its original decision in this case to the effect that their indictments should be dismissed, and we hope and trust that the Court will stand by its decision.

Respectfully submitted,
Philip C. Chouinard,
by his attorneys,
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